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No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,
Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING
and Brief in Support of Petition

CHAS. A. WALLACE,
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Seattle, Washington.

THE ARGUS, SEATTLE

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PETITION FOR REHEARING

Appellant respectfully requests this Honorable Court to grant a rehearing in the above entitled cause for the reason that the evidence, most all of which is documentary, conclusively shows the following facts, fully establishing appellant's contentions, all of which this Court found were not proven.

1.

It was the intention of the appellee to sell, and that appellant should find a customer for all its property, including timber lands, cut over lands, mills, cottages and other structures.

2.

The documents as written did not fully describe all

of the property to be sold and did not conform to the intention and agreement of the parties, and for that reason the contract as written is within the statute of frauds and not enforcible at law.

3.

The contract as written by the appellee was so written through inadvertence and mistake on its part, or with the intention to write it in such manner, and in such form, and with such defective description, to bring it within the statute of frauds of the State of Washington and make it unenforcible at law, and thereby commit a fraud upon the appellant.

4.

Plaintiff's exhibit 4 (Transcript 114) does not form any part of the contract in question, was never introduced in evidence, and was included in the transcript of record by accident and error and should be excluded under Equity Rule 76.

5.

The written documents constituted a sufficient memorandum in writing to justify the Court in concluding that all the timber lands, cut over lands, mills, cottages and other structures were intended to be sold and were sufficiently clear to unmistakably indicate to the Court the property that was intended to be sold so as to justify the Court in reforming the instruments by including therein a description of the property referred to in the writings.

6.

The contract was fully performed by appellant and, for this reason, the Court should have reformed the contract to enable her to recover from appellee com-

pensation for services performed and accepted by appellee.

Counsel for appellant was misled by the trial Court in that when the trial Court refused to grant appellant a jury trial in conjunction with the action to reform, and announced that it would hear evidence relating only to the question of reformation, it was not considered that in the hearing on reformation alone appellant should go fully into the facts establishing full and complete performance of her contract and showing that she was the procuring cause of the sale of said property to the Mason County Logging Company.

We respectfully submit that a rehearing should be granted and the contract performed and the cause remanded to the lower Court for trial upon the merits.

Respectfully submitted,

B. S. GROSSCUP,
W. C. MORROW,
CHAS. A. WALLACE,
Counsel for Appellant.

CHAS. A. WALLACE, one of counsel for appellant, hereby certifies that in his judgment the petition for rehearing in the above entitled cause is well founded and that it is not interposed for delay.

CHAS. A. WALLACE.

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BRIEF

In Support of Petition for Rehearing

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THE ARGUS, SEATTLE

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BRIEF
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ARGUMENT

The Court, in its decision, says: "The mills and cottages and other structures were doubtless intended by both parties to be within the terms of the contract. * * * *" The letter of July 5th, 1923 (plaintiff's exhibit 1, Tr. 85), says: "We are enclosing herewith plat showing our holdings, together with holdings of other companies in the vicinity." While this does not refer to the cut over lands, the letter of August 15, 1923 (plaintiff's exhibit 5, Tr. 117), re-

fers to the option of August 28, 1923 (plaintiff's exhibit No. 6), which Mr. Dollar says was an option to sell all of the holdings of the Vance Lumber Company and its logging operations around Malone, and that this was the option which he referred to in his letter to Miss Gaunt (plaintiff's exhibit 5). This testimony is found on page 57 Transcript.

In the option (plaintiff's exhibit 6, Tr. 118), we find this language: "There is herewith sent you a list of our 'timber lands.' There is also sent you a list of all of our lands covered by the option which includes the timber lands and the logged off lands." Coupling this option with appellee's letter (plaintiff's exhibit 5), all of which are signed by the appellee, it conclusively shows that it was the intention of the appellee to sell the cut over lands. This declaration of the defendant is in harmony with the testimony of Isaac A. Wilson (Tr. 63): "At that time Mr. Dollar explained that they wanted to sell all their holdings, logged-off lands, mill, townsite, timber, etc." While Mr. Dollar testifies that it was not the intention of the appellee to sell its cut over lands, he does not deny Mr. Wilson's testimony to the effect that they wanted to sell the logged-off lands. The reference by appellee (in exhibit 5) to the option (exhibit 6) constitutes a sufficient written memorandum signed by the party to be charged, to justify the Court in concluding that the cut-over lands were intended to be sold, and the Court should have found from this evidence that the cut-over lands were intended to be sold, and that these signed documents were sufficient to warrant the Court in reforming the contract, notwithstanding the oral

testimony of Mr. Vance, Mr. Dollar, and Mr. Abel, to the effect that it was not the intention of the appellee to sell the cut-over lands. Appellee's witnesses testified that the cut-over lands were included for the purpose of making the sale, but the written evidence conclusively shows that the cut-over lands were included in the option (plaintiff's exhibit 6), which was the first and only option ever entered into between appellee and the buyer.

It is significant that the option fixed the price of the entire holdings of $3,250,000.00 and the evidence shows that the price actually paid was $2,500,000.00. If, as appellee says, 1,000 to 2,000 acres of valuable cut-over lands were not included in appellant's deal and was included in the sale, that the price quoted should be the same in each instance.

The foregoing fully covers the grounds set forth in 1 and 2 of the petition for rehearing.

The failure of the appellee to describe the property intended to be sold was apparently a mistake insofar as it applied to the lands upon which the mills, cottages and other structures were situated, for it appears from all the testimony, and the Court so finds, that it was the intention of both parties to sell the lands upon which these structures were located. Mr. Dollar testified (Tr. 59) that the logged off lands was the only property which was intended to be excluded from the sale. Under this testimony a reasonable person would conclude that the description of the lands upon which these structures stood was omitted by mistake. If it was not by mistake, then the only conclusion left which any reasonable mind could ar-

rive at is that it was, by fraud of the appellee, omitted from the documents. Appellee contends, and the Court finds, that the omission of the description of the cut-over lands was intentional. In view of the signed memorandums (plaintiff's exhibits 1, 5 and 6) the intentional omission of these lands from the written documents constituting the memorandum of agreement was a deliberate fraud of the appellee upon the appellant.

Mr. Dollar testified with reference to plaintiff's exhibit 2 (which was only an exhibit for identification), as follows:

> "Q. Now, Mr. Dollar, was this made by you?
>
> A. No.
>
> Q. Was this (plaintiff's exhibit No. 4) enclosed with your letter of July 5, 1923?
>
> A. No, sir; no it was never made in our office."

This testimony was not included in appellant's statement of the evidence for the reason that neither the document nor the testimony was pertinent to any of the issues to be determined by this Court, and exhibit 4 had no place in the record, and was included therein by mistake of counsel for appellant in the praecipe for transcript of the record as shown on pages 135 and 136 of the record, item No. 11, calling for plaintiff's exhibits numbering from 1 to 16, both inclusive, and should not have contained exhibit for identification No. 4 without Mr. Dollar's explanation thereof. If Mr. Dollar's testimony with respect to this exhibit is questioned by counsel for appellee, then we respectfully request this Honorable Court

to call for a supplemental transcript covering all testimony relating to this exhibit.

This Court, in considering plaintiff's exhibit 4 (Tr. 114), says: "Neither upon the plat nor in this writing was there any description of the cut-over lands, and there is no contention that the company owned all or even the major portion of Sections 10, 16 and 17 in Township 17." Plaintiff's exhibit 3 is the contract between the Mason County Logging Company and the appellee under which the lands were sold, and the description of the lands in 10, 16 and 17 shows that the appellee owned three-quarters of Section 10 (except 4 small garden tracts, the largest of which contained 5.2 acres) not described by metes and bounds as the Court finds, but by legal subdivision (Tr. 88). In Section 16 the company owned substantially one-half of this section and approximately 100 acres in Section 17, which is substantially one-half of the lands in these three sections.

The Court did not give due consideration to the testimony which conclusively established the fact that the trial Court was in error in finding "The most that can be said, the letter with the plat, is the conclusion of the minds of the parties, and basis on which the minds met if they did meet. There was no mutual mistake. If the minds of the parties did not meet upon the letter and the map, there was no meeting of the minds. From the bill of complaint, the minds of the parties never met as to the identity of the property to be sold." "With this view," says this Court, "we are in accord." This Court further says: "Not only is there an absence of reference in

the writing to the cut-over lands but the evidence leaves no room for doubt that such lands were intentionally excluded from the coverage of the so-called contract and the omission of their description was a result of neither mutual mistake or fraud." This conclusion of the Court cannot be justified if you consider and give proper weight to the letter (plaintiff's exhibit 5) which referred to the option (plaintiff's exhibit 6) both of which were signed by the appellee, and the option specifically referred to the logged off or cut-over lands and specifically referred to all the lands of the appellee, including the *timber lands* and *logged off lands.* Such a reference is sufficient, when signed by the party to be charged, to constitute a memorandum of agreement and to warrant the Court in reforming the contract. When these documents, all of which are signed by the party to be charged, are taken together they are sufficient to warrant the Court in concluding that the cut-over lands were intended to be in the memorandum, and such a reference is sufficient to connect all the documents relating to the transaction.

Beckwith v. Talbot, 95 U. S. 289;
Ryan v. United States, 136 U. S. 68.

This Court further said: "It is to be inferred that both parties in good faith believed it (the memorandum) to be sufficient, and the mistake was a mistake in judgment as to its legal sufficiency." If the Court here has reference to the sufficiency of the memorandum under the statute of frauds to constitute a cause of action at law, we fully agree; but it is appellant's contention that she should not be required to go fur-

ther than to produce and prove by competent evidence, signed memorandums, referring to each other, sufficiently identifying the property to warrant a Court of equity in saying that the property intended to be sold is sufficiently referred to to be identified, and that a description of the property can be ascertained from the signed memorandum. This Court is in error in holding that the memorandum agreement could not be reformed, even though it is correct in concluding that the mistake was one of law, for there was no evidence upon which the Court could justify its conclusion that appellant had not fully and completely performed her part of the agreement. The record shows that, after receiving the letter of July 5th, she commenced to perform her contract and to seek a customer for appellee's property, and on August 9th advised appellee by letter (plaintiff's exhibit 9) that she had submitted the property to Mark E. Reed and his associates for their consideration. This shows, contrary to the finding of this Court, an acknowledgment of her obligation and an effort to perform her part of the contract, and was a complete performance for the reason that six days thereafter appellee requested appellant not to do anything further in the matter until she heard from them again (Plaintiff's exhibit No. 5). The appellant was never thereafter called upon to do anything further and her contract, on her part, was fully and completely performed.

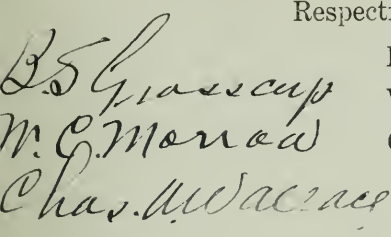
Mr. Bordeaux, in his deposition (which is an exhibit in the above entitled case) on page 36 of the original document, pp. 38 to 41 of the printed supplemental transcript of record, testified that Mark E. Reed was

one of the directors of the Mason County Logging Company; that Reed represented Mrs. Anderson or the Anderson Estate, and that Mrs. Anderson was owner of 50% of the stock of the Mason County Logging Company. Mr. Bordeaux says he talked to Mr. Reed about August 27, 1923, when the option was taken and that it was very likely that the option was taken as a result of this talk with Mr. Reed and that he and his brother who were the other trustees of Mason County Logging Company would not have purchased the Vance property without Mr. Mark E. Reed's consent (Bordeaux's deposition, page 51). Appellee produced Reed and Reed purchased the property for Mason County Logging Company. It could not and would not have been purchased without his consent.

Ample and sufficient additional testimony touching upon the question of whether or not appellant was the procuring cause of the sale to the Mason County Logging Company can be produced and would have been produced at the trial of said cause if the trial Court had not ruled that the only question which he would try was the question of reformation. If the Court had called a jury as requested, or had announced that he would not grant appellant a jury trial, and that he would try, along with the question of reformation, the case on its merits, sufficient competent testimony would have been introduced to established the fact that she was the procuring cause of the sale to the Mason County Logging Company. The record shows that she fully performed her contract, at least up to the time appellee requested her to not do anything further

and as they never thereafter called on her to do anything more her contract was fully performed.

Respectfully submitted,



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